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December 13, 2000

EXECUTIVE OFFICE #00-03

D-R-A-F-T

TO: County Agricultural Commissioners

SUBJECT: VIOLATIONS INVOLVING EMPLOYEES NOT WEARING REQUIRED
PERSONAL PROTECTIVE EQUIPMENT

Since I issued my August 9, 2000 decision in the Marvin Nies appeal of a county agricultural commissioner's (CAC's) civil penalty decision (Docket No. 088), the Department of Pesticide Regulation (DPR) has received several inquiries. The inquiries relate to citing employers when an employee is not wearing personal protective equipment (PPE) specified on a product label, and citing employers and employees under Food and Agricultural Code section 12973. This letter addresses those inquiries.

Under provisions of the Labor Code, the employer is required to furnish employment and a place of employment that is safe and healthful for its employees. With certain exceptions, the Department of Industrial Relations is responsible for developing and enforcing occupational safety and health standards in California. The Legislature provided that the Department of Pesticide Regulation (and previously the Department of Food and Agriculture) is responsible for developing regulations (standards) for worker health and safety in the pesticide workplace, and provided that those regulations are to be enforced by DPR and the CACs. DPR's regulations provide a worker safety program that places requirements on employers regarding their employees' safety, including utilization of label-specified PPE.

What sections can the commissioner charge the employer and/or employee with violating when the employee is not wearing personal protective equipment specified on the product label?

In January 1995, the Pesticide Enforcement Branch issued ENF 95-005 entitled "Enforcement Discretion for Worker Safety Violations Committed by Employees." That letter included criteria for CACs to consider when an employer violates a pesticide worker safety regulation involving PPE because an employee was not wearing the PPE specified in the regulation. ENF 95-005 did not say or suggest that an employer could be charged with violating FAC section 12973 when an employee does not wear label-specified PPE. Even under ENF 95-005 it was not appropriate for a CAC to charge the employer with a violation of FAC section 12973 when an employee was not wearing label-specified PPE. The only person who has a duty to comply with the PPE label requirement (PPE the label specifies be worn or used) is the person who is to be utilizing the PPE.



Under the federal worker protection standard (WPS) regulations (Title 40 CFR Part 170), the employer has duties similar to those in DPR's regulations -- mainly, to assure that their employees wear the PPE specified on the label. Those federal regulations are incorporated by reference on the product label. Under those regulations/label requirements, a person who has a duty under the WPS, as referenced on the label, and failed to perform that duty violated the federal law that requires that pesticides be used in a manner consistent with labeling. That person is subject to a civil penalty imposed by the U.S. Environmental Protection Agency (U.S. EPA). Therefore, when an employee is not wearing label-specified PPE, the U.S. EPA could charge the employer with "using the pesticide in conflict with the label," but the charge and penalty would be for the employer's failure to comply with the *employer's own federal WPS requirement to assure the employee wore the label-specified PPE* -- not for the employee's failure to wear the PPE.

Under DPR's worker safety regulations, the commissioner cannot charge the employer with a section 12973 "use in conflict with the label" violation when the employee is not wearing label-specified PPE or for not complying with the employer's WPS duty. This is because DPR's regulations, in section 6701, *specifically provide*:

It is intended that these [DPR's] regulations, rather than those in Title 40 Code of Federal Regulations, Part 170 [the federal worker protection standard regulations], be enforced by the Department of Pesticide Regulation and county agricultural commissioners. Any references to Part 170, Code of Federal Regulations on pesticide product labeling shall be considered a reference to Title 3, Division 6, California Code of Regulations when use occurs within California.

Therefore, when an employee does not wear required PPE (whether the PPE is specified in labeling, in DPR regulations, or in both labeling and DPR regulations), if the commissioner takes civil penalty action against the employer, the employer is to be charged with violating the applicable DPR regulation (or regulations) with which the employer did not comply, and is not to be charged with violating FAC section 12973. If the employer has met all its requirements, the CAC cannot impose a civil penalty against the employer.

For example, Title 3, California Code of Regulations (3 CCR), section 6702 requires employers to "supervise employees to assure that safe work practices, including all applicable regulations and pesticide product labeling requirements, are complied with." Section 6702 also requires employers to "take all reasonable measures to assure that employees handle and use pesticides in accordance with the requirements of law, regulations, and pesticide product labeling" Section 6602 requires that a copy of the registered labeling be available at the use site.

Section 6738 requires employers to assure that "Employees wear protective eyewear when required by pesticide product labeling (except as expressly provided in this section) or when employees are engaged in" specified activities. Section 6738 imposes similar requirements on employers in regard to other label-specified PPE (e.g., gloves, chemical resistant footwear, chemical resistant headgear, chemical resistant aprons, chemical resistant suits, and respiratory protective equipment). The employer is required to provide hazard communication information to employees who handle pesticides (section 6723) and to have a written training program and provide specified training to employees who handle pesticides (section 6724).

ENF 95-005 also provided that when registered labeling requires PPE and the employee does not wear that PPE, CACs may initiate an enforcement action against the employee by citing FAC section 12973 (use of a pesticide in conflict with its registered labeling). ENF 95-005 also stated that DPR intended to amend its Policies and Procedures Manual (B Section), i.e., to adopt/amend its regulations, to include this new policy. ENF 95-005 was a temporary policy until the regulations were amended/adopted.

Since issuing ENF 95-005 in 1995, DPR adopted regulations that impose requirements on employees in regard to PPE (in section 6702); substantially include the "criteria" in ENF 95-005 (in section 6130); and specify when a CAC can levy a civil penalty against certain employees that did not utilize required PPE (in section 6130). Those regulations became effective on January 1, 1997. Therefore, ENF 95-005 has been superceded by the regulations.

Section 6702(c) requires employees to utilize the PPE and other safety equipment required by pesticide product labeling or specified in regulations *"that has been provided by the employer at the work site in a condition that will provide the safety or protection intended by the equipment."* Section 6130 (Civil Penalty Actions by Commissioners) allows CACs to take civil penalty action against employees not wearing PPE for violating section 6702(c), but only under certain circumstances. *First*, the required PPE must have "been provided by the employer at the work site in a condition that will provide the safety or protection intended by the equipment." *Second*, the employee must be licensed or certified pursuant to Chapter 14, Division 3, of the Business and Professions Code (which regulates persons involved in structural pest control); Chapters 5 or 8, Division 6, of the FAC; or Chapters 3.4 or 3.6, Division 7, of the FAC. *Third*, the CAC must determine that all the conditions specified in section 6130(b) (1) through (5) are met.

When adopting section 6130(b), DPR made a policy decision that civil penalty actions would not be taken against employees not wearing PPE *unless* they were violating section 6702(c), and *unless* they were licensed or certified as specified in section 6130 and other section 6130 conditions are met. DPR made this decision based on the premise that licensed or certified persons have passed examinations covering pesticide laws and regulations and, therefore, should have a higher standard of responsibility to comply with those laws and regulations than a

non-licensed or non-certified employee that, basically, has only the pesticide knowledge that the employer provides through training.

Under existing regulations, CACs may take civil penalty actions against certain licensed or certified employees not wearing required PPE, as specified above, for violations of 3 CCR section 6702(c), but not for violations of FAC section 12973. And, as stated above, if civil penalty action is taken against an employer whose employee was not wearing required PPE, the employer is to be charged with violating the applicable DPR regulation(s), not for violating section 12973.

In short, in California, when an employee is not wearing regulation-specified or label-specified PPE, we must look to see what requirements/duties the employer did not meet that may have led to the employee's failure to wear/utilize the required PPE. When an employee is not wearing required PPE, the employer most likely violated one or more of DPR's pesticide worker safety regulations or another regulation such as section 6602, which requires that a copy of the registered labeling be available at the use site. However, there may be rare instances when an employee is not utilizing the required PPE and the employer has met all its requirements. In those instances, no penalty is to be levied against the employer.

In the case of Marvin Nies (Docket No. 088), there was information in the record that there was no copy of registered labeling available at the use site; the last documented training was done two and one-half years before the incident where the employee was not wearing all required PPE; pesticide use reports were not available or submitted; hazard communication for handlers was not completed; the pesticide trainer was not certified; all required topics were not covered (specific pesticides were not covered); training records were not complete; and there was no respiratory training program. Perhaps some of those matters contributed to the employee's failure to utilize all required PPE; however, the employer was not charged with any violations concerning these matters.

Enclosed is a chart showing examples of administrative civil penalty citations for violations where an employee was not wearing required PPE.

When can employers or employees be charged with violating FAC section 12973?

If, when making a pesticide application, an employee applies a pesticide to a crop not on the label, gets the pesticide in a stream in violation of a label requirement to not get the pesticide in streams, or does not comply with a labeled buffer zone requirement or other *non-PPE* label requirement, the CAC can charge the employer with a violation of FAC section 12973.

Similarly, if when mixing and loading a pesticide, the employee fails to follow a *non-PPE* label requirement, the CAC can charge the employer with a violation of FAC section 12973.

This is because when an employee whose duties include mixing and loading a pesticide or making a pesticide application performs those activities, the employee does so for or on behalf of the employer. For example, a grower, or grower's foreman, tells or instructs an employee to apply a certain pesticide to a certain location, or a pest control business owner, or the business's qualified applicator, instructs an employee to apply a certain pesticide "for the Adams Ranch job." When an employee applies pesticides as part of his or her duties in conjunction with the employer's business, the employer is responsible for the employee's acts, including those that may cause damage to other persons, other property, or the environment.

Because the label is required to be at the use site, the employee is doing the actual mixing and loading or making the application, and the employee is expected to follow the label directions, the CAC could charge the employee with a *non-PPE* violation of FAC section 12973, when the label is at the mix/load or application site, instead of, or in addition to, charging the employer with the violation. Generally, the CAC may decide to charge only the employer with the non-PPE FAC section 12973 violation, and then leave it to the employer to deal with the employee—i.e., give the employee better training, greater supervision, discipline, assign the employee duties that do not involve pesticide handling, or even fire the employee.

However, if the county's investigation shows that the employer had made a copy of the registered labeling available at the use site, and the involved employee was experienced and had received all required training, the CAC may decide to charge the employee with the non-PPE FAC section 12973 violation. Particularly where the employee is a licensee, such as a pest control aircraft pilot, the CAC may want to charge the employee in addition to, or instead of, the employer for a non-PPE FAC section 12973 violation. The decision of whether to charge the employer, the employee, or both, with a non-PPE violation of FAC section 12973 is in the discretion of the CAC.

When the employer is an individual, such as a grower, and is not wearing label-specified PPE, that individual can be charged with a violation of FAC section 12973 for not wearing the label-specified PPE.

Sincerely,

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Enclosure

Examples of Administrative Civil Penalty Citations for Violations Where an Employee Was Not Wearing Required Personal Protective Equipment (PPE)

Example	Possible section(s) violated <i>This list is not all-inclusive.</i>	Employee's license or certificate status	Who is cited?
Employee who is not a licensee or certificate holder* fails to wear PPE specified on the label.	3 CCR §6702 and/or §6738	None	Employer
Employee who is not a licensee or certificate holder* fails to wear PPE specified by other than the label (e.g., specified in regulations).	3 CCR §6702 and/or §6738	None	Employer
Employee who is a license or certificate holder* fails to wear PPE specified on the label and the employer has not provided PPE at the work site in a condition to provide the intended protection.	3 CCR §6702 and/or §6738	Employee is a license or certificate holder.*	Employer
Employee who is license or certificate holder* fails to wear PPE specified on the label and the employer does not have a written disciplinary program as specified in 3 CCR §6130.	3 CCR §6702 and/or 6738	Employee is a license or certificate holder.*	Employer
Employee who is license or certificate holder* fails to wear PPE specified on the label <u>and all criteria in 3 CCR §6130 (b) are met</u> which would allow citing the employee.	3 CCR §6702 (c)	Employee is a license or certificate holder.*	Employee

FAC = Food and Agricultural Code

3 CCR = Title 3, California Code of Regulations

PPE = Personal Protective Equipment (within the context of pesticide worker safety requirements).

*License or certificate holder pursuant to Chapter 14, Division 3, of the Business and Professions Code (which regulates persons involved in structural pest control); or Chapters 5 or 8, Division 6 of the FAC; or Chapters 3.4 or 3.6, Division 7 of the FAC.